Ravindra a/p K Karuppiah (claiming as bearer of the letters of administration for the estate of the deceased, Muthiyah a/l Seethambaram) v CIMB Bank Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(IM)(NCVC)-1195–06 OF 2019 AND W-02(IM)(NCVC)-32–01 OF 2020
KAMALUDIN MD SAID, RAVINTHRAN AND NORDIN HASSAN JJCA
29 MARCH 2023

Civil Procedure — Res judicata — Matters which could and should reasonably have been raised in earlier proceedings — Bank obtained order for sale of property and conducted public auction — Property sold in public auction — Failure to challenge order for sale in foreclosure proceedings — Appellant challenged order for sale via writ action — Appellant's action struck out — Appellant filed another action to set aside order for sale — High Court struck out action — Whether High Court addressed issue of res judicata — Whether appellant's action barred by doctrine of res judicata — Whether res judicata in wider sense applicable — Whether issues raised in present suit belonged to previous suit — Whether appellant litigating by instalments — Rules of Court 2012 O 18 r 19

The appellant was the administrator of the estate of her late husband, Mr Muthiyah Seethambaram ('Mr Muthiyah'). Mr Muthiyah had obtained a loan in the sum of RM62,249 from CIMB Bank Bhd ('CIMB') which was used to improve his property ('the property') and the said loan was secured by way of charge over the said property. The problem arose when Mr Muthiyah passed away with the loan still outstanding and his family failed to settle the outstanding sum. This situation prompted CIMB to initiate foreclosure proceedings and subsequently obtained the order for sale of the property. Public auction was held, and Mr Ong Kay Ho ('Mr Ong') had successfully purchased the property at the reserve price of RM350,000. The appellant did not challenge the order for sale in the foreclosure proceedings, instead, she filed a writ action ('Suit 723') to set aside the order for sale against CIMB and Mr Ong. However, the action against CIMB was struck out by the court under O 18 r 19 of the Rules of Court 2012 ('the ROC') and the appellant subsequently withdrew the action against Mr Ong. The appellant then once again filed another suit against CIMB and Mr Ong to set aside the order for sale and both CIMB (via encl 15) and Mr Ong (via encl 38) filed applications to strike out the appellant's suit. The High Court allowed encls 15 and 38 and ruled that the appellant was estopped from instituting the present suit to set aside the order for sale because the issue was not raised in the previous

proceedings. Aggrieved by the High Court's decisions, the appellant filed the present appeals. The issues arose were: (a) whether the High Court had addressed the issue of res judicata; and (b) whether the action by the appellant was barred by the doctrine of res judicata.

Held, dismissing both appeals with costs of RM3,000 each subject to payment of allocatur:

(1) Although the learned High Court judge did not specifically mention the term res judicata in her grounds of judgment, it was obvious that her reason for allowing the striking out application was grounded in the said doctrine that was pleaded and argued before her. Based on the grounds of judgment of the learned High Court judge, it was abundantly clear that the respondents' submission that the doctrine of res judicata applied to the present case was accepted by the High Court. The fact that the learned judge used the phrase 'estopped' was a clear reference to the doctrine of res judicata. Even if it were otherwise, as res judicata was pleaded and argued in the court below, the appeal court in the present appeals was not precluded from considering it at this stage (see paras 16 & 19).

(2) The same matter finally decided by a court of competent jurisdiction between the same parties or their privies should not be litigated again. Otherwise, there would be no end to litigation and the binding effect of court decisions would be lost. In para 29 of the statement of claim in the instant case, the appellant pleaded that the cause of action in the previous suit was based on a 'tort' and that the issues raised here were different. The court was of the view that this plea was no answer to the principles governing the application of the doctrine of res judicata. The wider principle of res judicata would necessarily include the instant suit even if the previous action was a 'tort' (see para 31).

(3) In the present case, the appellant sued the same parties as in Suit 723. The principal relief was the same, ie, to nullify the order for sale and the auction sale. In fact, in Suit 723, it was also pleaded that the auction sale was illegal although the main thrust of the pleading was about the negligence of the bank rather than non-compliance with O 15 r 6A of the ROC and with s 431A of the National Land Code. The court was of the view that these issues clearly and unmistakably belonged to the earlier suit as the objective of both suits was the same. Given the factual matrix of Suit 723 and the present suit, the appellant was litigating by instalments. The doctrine of res judicata did not permit such an approach (see paras 36–37).

(4) It may well be debatable whether the contravention of the law that was pleaded in this case was substantive, as in the Federal Court case of *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance*

Bhd [1998] 1 MLJ 393, or only procedural. However, the important point to note was that the appellant, although aware of the threat of foreclosure proceedings, did not intervene during the hearing where the order for sale was granted. She impugned the order for sale via Suit 723. That was the time to argue based on the *Badiaddin* case that because the order for sale was illegal for non-compliance with substantive law, the doctrine of res judicata did not prevent her from challenging it collaterally in separate proceedings. She did not do so and did not file any appeal when the suit was struck out. Thus, the illegality issue should have been raised in the charge action or in Suit 723 which was filed to impugn the order for sale. It was a point that clearly belonged to and was part of the earlier proceedings. In the premises, the court was constrained to hold that the doctrine of res judicata barred the appellant from prosecuting a matter that had already been adjudicated twice, ie, in the charge action and in Suit 723 (see para 41).

[Bahasa Malaysia summary

Perayu adalah pentadbir harta pusaka arwah suaminya, Encik Muthiyah Seethambaram ('Encik Muthiyah'). Encik Muthiyah telah memperoleh pinjaman berjumlah RM62,249 daripada CIMB Bank Bhd ('CIMB') yang digunakan untuk menambah baik rumahnya ('rumah tersebut') dan rumah tersebut dijadikan cagaran bagi pinjaman tersebut. Masalah timbul apabila Encik Muthiyah meninggal dunia dengan pinjaman tersebut masih tertunggak dan keluarganya gagal menjelaskan jumlah tertunggak tersebut. Keadaan ini mendorong CIMB untuk memulakan prosiding perampasan dan seterusnya memperoleh perintah penjualan rumah tersebut. Lelongan awam telah diadakan, dan Encik Ong Kay Ho ('Encik Ong') telah berjaya membeli rumah tersebut pada harga rizab RM350,000. Perayu tidak mencabar perintah penjualan dalam prosiding perampasan tersebut, sebaliknya, dia memfailkan tindakan writ ('Saman 723') terhadap CIMB dan Encik Ong untuk mengenepikan perintah penjualan tersebut. Bagaimanapun, tindakan terhadap CIMB telah dibatalkan oleh mahkamah di bawah A 18 k 19 Kaedah-Kaedah Mahkamah 2012 ('KKM 2012') dan perayu kemudiannya menarik balik tindakan terhadap Encik Ong. Perayu kemudiannya sekali lagi memfailkan satu lagi saman terhadap CIMB dan Encik Ong untuk mengenepikan perintah penjualan tersebut dan kedua-dua CIMB (melalui lampiran 15) dan Encik Ong (melalui lampiran 38) memfailkan permohonan untuk membatalkan saman perayu. Mahkamah Tinggi membenarkan lampiran 15 dan 38 dan memutuskan bahawa perayu telah dihalang daripada memulakan saman semasa untuk mengenepikan perintah penjualan kerana isu-isu tersebut tidak dibangkitkan dalam prosiding terdahulu. Terkilan dengan keputusan Mahkamah Tinggi, perayu memfailkan rayuan-rayuan semasa. Isu-isu yang timbul ialah: (a) sama ada Mahkamah Tinggi telah menangani isu res judicata; dan (b) sama ada tindakan perayu telah dihalang oleh doktrin res judicata.

Diputuskan, menolak kedua-dua rayuan dengan kos sebanyak RM3,000 setiap satu tertakluk kepada bayaran alokatur:

(1) Walaupun hakim Mahkamah Tinggi yang arif tidak menyebut secara khusus istilah res judicata dalam alasan penghakimannya, adalah jelas bahawa alasan beliau membenarkan permohonan pembatalan tersebut adalah berdasarkan doktrin tersebut yang telah diplid dan dihujahkan di hadapannya. Berdasarkan alasan penghakiman hakim Mahkamah Tinggi yang arif, adalah jelas sekali bahawa hujahan responden-responden bahawa doktrin res judicata terpakai bagi kes ini telah diterima oleh Mahkamah Tinggi. Hakikat bahawa hakim yang arif menggunakan frasa 'estopped' adalah rujukan yang jelas kepada doktrin res judicata. Jikapun tidak, memandangkan res judicata telah diplid dan dihujahkan di mahkamah bawahan, mahkamah rayuan dalam rayuan semasa tidak dihalang daripada mempertimbangkannya pada peringkat ini (lihat perenggan 16 & 19).

(2) Perkara yang sama yang akhirnya diputuskan oleh mahkamah yang mempunyai bidang kuasa kompeten antara pihak yang sama atau privi mereka tidak seharusnya dibicarakan lagi. Jika tidak, litigasi tidak akan berakhir dan kesan mengikat keputusan mahkamah akan hilang. Dalam perenggan 29 pernyataan tuntutan dalam kes semasa, perayu memplidkan bahawa kausa tindakan dalam saman terdahulu adalah berdasarkan 'tort' dan isu yang dibangkitkan di sini adalah berbeza. Mahkamah berpendapat bahawa hujahan ini bukan jawapan kepada prinsip yang mengawal penggunaan doktrin res judicata. Prinsip res judicata yang lebih luas semestinya merangkumi saman semasa walaupun tindakan sebelumnya adalah 'tort' (lihat perenggan 31).

(3) Dalam kes ini, perayu menyaman pihak yang sama seperti dalam Saman 723. Relif prinsipal adalah sama, iaitu, untuk membatalkan perintah penjualan dan jualan lelongan. Malah, dalam Saman 723, juga telah diplidkan bahawa jualan lelongan adalah menyalahi undang-undang walaupun teras utama pliding tersebut adalah mengenai kecuaian bank dan bukannya ketidakpatuhan A 15 k 6A KKM 2012 dan dengan s 431A Kanun Tanah Negara. Mahkamah berpendapat bahawa isu-isu ini jelas dan tidak dapat disangkal milik saman terdahulu kerana objektif kedua-dua saman adalah sama. Berdasarkan matriks fakta Saman 723 dan saman semasa, perayu telah membuat litigasi secara ansuran. Doktrin res judicata tidak membenarkan pendekatan sedemikian (lihat perenggan 36–37).

(4) Mungkin boleh dipertikaikan sama ada pelanggaran undang-undang yang didakwa dalam kes ini adalah substantif, seperti dalam kes Mahkamah Persekutuan *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393, atau hanya prosedural. Walau bagaimanapun, perkara penting yang perlu diberi perhatian ialah perayu,

walaupun menyedari ancaman prosiding perampasan, tidak mencelah semasa perbicaraan di mana perintah jualan telah diberikan. Dia mencabar perintah penjualan tersebut melalui Saman 723. Itulah masanya untuk berhujah berdasarkan kes *Badiaddin* bahawa disebabkan perintah jualan tersebut adalah menyalahi undang-undang kerana tidak mematuhi undang-undang substantif, doktrin res judicata tidak menghalang perayu daripada mencabarnya secara kolateral dalam prosiding berasingan. Dia tidak berbuat demikian dan tidak memfailkan apa-apa rayuan apabila saman tersebut dibatalkan. Oleh itu, isu berhubung kesalahan undang-undang sepatutnya dibangkitkan dalam tindakan cagaran atau dalam Saman 723 yang difailkan untuk mencabar perintah penjualan tersebut. Ia adalah perkara yang jelas milik dan merupakan sebahagian daripada prosiding terdahulu. Berdasarkan alasan tersebut, mahkamah terpaksa memutuskan bahawa doktrin res judicata menghalang perayu daripada mendakwa sesuatu perkara yang telah pun diadili sebanyak dua kali, iaitu dalam tindakan cagaran dan dalam Saman 723 (lihat perenggan 41).]

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)
Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393; [1998] 2 CLJ 75, FC (distd)
Greenhalgh v Mallard [1947] 2 All ER 255, CA (refd)
Henderson v Henderson (1843) 3 Hare 100 (refd)
SCF Finance Co Ltd v Masri and another (No 3) [1987] QB 1028, CA (refd)
Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor [1975] AC 581, PC (refd)

Legislation referred to

Contracts Act 1950 s 66
Malay Reservations Enactment 1933
National Land Code s 431A, Form 16D
Rules of Court 2012 O 15 r 6A, 6A(4), O 18 r 19

Appeal from: Civil Suit No WA-22NCVC-540–08 of 2018 (High Court, Kuala Lumpur)

Amarjeet Singh (with Chanravathane a/p S Ponnudurai) (SP Chanra) for the appellant.
Jagjit Kaur a/p Ujagar Singh (with Tengku Nazihah Hanis bt Tg Abd Nawawi) (Sidek Teoh Wong & Dennis) for the respondent.

Ravinthran JCA:

INTRODUCTION

[1] There are two appeals before us. The appellant is the same in both appeals. The respondent in the first appeal (W-02-(IM)(NCvC-1195–06 of 2019) is CIMB Bank Bhd whereas the respondent in the second appeal (W-02-(IM)(NCvC-32–01 of 2020) is Ong Kay Ho. The subject matter of the dispute is a detached house which was sold in a public auction. Both appeals arise from the decision of the High Court to strike out the suit of the appellant to set aside the order for sale and nullify the auction sale.

[2] The appellant is Ravindra a/p Karuppiah. She is the administrator of the estate of her late husband, Mr Muthiyah Seethambaram, who was the previous registered owner of the property. The respondents' separate applications to strike out the suit were successful, and hence the two instant appeals before us. Both appeals were heard together pursuant to an order of this court. To avoid confusion, we shall refer to the respondents by their names.

BACKGROUND FACTS

[3] The property which is the subject of dispute between the parties is a detached house bearing postal address 809, Kampung Tasek Permai, Ampang, Selangor. It was purchased by Mr Muthiyah who used it as his family home. CIMB Bank Bhd granted Mr Muthiyah a loan in the sum of RM62,249 on 5 May 2006. The loan was taken to improve the property in question. The loan facility was known as Homextra Facility and it included Group Mortgage (GMTA) Term Assurance for the sum of RM2,249. On 9 October 2008, Mr Muthiyah signed the loan agreement and at the same time executed a charge in favour of CIMB Bank as security for the loan. The loan was to be repaid within 15 years. However, on 16 February 2014, Mr Muthiyah died of a heart attack. Following his death, CIMB Bank as the policy owner of the GMTA recovered the insured sum of RM19,765. Nevertheless, there was a balance of RM37,772.15 still outstanding on the loan account.

[4] CIMB Bank's case is that Mr Muthiyah's family was informed of the outstanding amount via several notices of demand and instruction was sought on the redemption of the outstanding sum. As the family of the deceased failed to settle the redemption sum, CIMB Bank instituted foreclosure proceedings (Case No 24FC-550–06 of 2016) on 10 June 2016. However, Mr Muthiyah, the deceased borrower, was named as respondent in the originating summons that was filed to realise the statutory charge. CIMB Bank obtained the order for sale on 15 July 2016 and a public auction was held at the Kuala Lumpur High Court on 17 October 2016. Ong Kay Ho successfully purchased the property

in question at the reserve price of RM350,000 and subsequently became the registered owner.

[5] The appellant did not intervene to challenge the order for sale in the foreclosure proceedings. Instead, she filed a writ action, namely Civil Suit No BA-22NCvC-723–12 of 2017 (Suit 723) on 15 December 2017 to set aside the order for sale that was obtained by CIMB Bank to auction the property in question. CIMB Bank filed a striking out application under O 18 r 19 of the Rules of Court 2012. The action against CIMB Bank was struck out on 21 May 2018 by the High Court. The appellant did not appeal against this decision. Thereafter, the appellant withdrew the action against the second defendant, ie, Ong Kay Ho.

[6] Following the striking out of Suit 723, the appellant commenced another suit which is the subject matter of the instant appeals against CIMB Bank and Ong Kay Ho on 30 August 2018. Once again, the appellant applied to set aside the order for sale that was granted on 15 July 2016.

DECISION OF HIGH COURT

[7] CIMB Bank and Ong Kay Ho filed separate applications in encls 15 and 38 to strike out the suit of the appellant. The same High Court judge granted their respective applications and struck out the writ and statement of claim of the appellant on 29 May 2019 and 6 January 2020. Her Ladyship wrote separate grounds of judgment.

[8] In respect of encl 15 by CIMB Bank, Her Ladyship found as follows. The notice of demand and Notice of Breach of Charge (Form 16D) were posted at the last known address of the borrower. Neither the appellant nor any other representative of the deceased borrower was present to show cause to the contrary at the foreclosure proceedings. Subsequently, all relevant documents relating to the auction sale were also sent to the same address. Therefore, the learned High Court judge found the order for sale to be regular. She rejected the claim of the appellant that the reserve price was below market value. Her Ladyship also ruled that the appellant was estopped from instituting the instant suit to set aside the order for sale because the issue was not raised in previous proceedings.

[9] In respect of encl 38, Her Ladyship held that following the striking out order in favour of CIMB Bank in encl 15, the prayers against Ong Kay Ho which are similar to the prayers against CIMB Bank have become academic. Since the appellant did not appeal the decision in the previous proceedings, Her Ladyship also found that the instant action is an abuse of the process of the court.

ARGUMENT OF PARTIES AND ISSUES IN THE APPEAL

[10] The principal aim of the reliefs sought by the appellant in the instant action is to set aside the order for sale and nullify the auction of the property in question. It is not disputed that the order of sale was obtained in proceedings where the estate of the deceased was not represented. It is also not disputed that the letter of administration was only extracted on 14 July 2017, ie, after the order for sale was granted and after the property was auctioned off.

[11] Counsel for the appellant argued that prior to the grant of the order for sale, CIMB Bank knew that Mr Muthiyah had passed away as they recovered the insured amount under the GMTA. Yet, they did not attempt to serve the representative of the deceased with the relevant notices. Counsel for the appellant pointed out that s 431A of the National Land Code ('the NLC') (Act 828, Revised 2020) provides that in the case of notice that is required to be served on a proprietor who has died, the registrar or Land Administrator may cause a notice to be served on any adult member of the family of the deceased. In the instant case, all the relevant notices including the Form 16D notice were in the name of the deceased. Thus, it was argued that there was no valid notice of demand and service of the Form 16D notice on the family of the deceased. It follows that the foreclosure proceedings were not lawful.

[12] The second argument is that the cause of action survived in favour of the estate or personal representative of the deceased. In the premises, the charge action in the name of the deceased was unlawful as it contravened O 15 r 6A of the Rules of Court 2012. The provision sets out the procedure to commence an action against the estate of a deceased person if no probate or letter of administration is taken out. Order 15 r 6A provides that the action brought against the 'personal representative' is treated as having been brought against the estate of the deceased person. Therefore, counsel for the appellant argued that the charge action is a nullity.

[13] In respect of the res judicata argument of CIMB Bank and Ong Kay Ho, counsel for the appellant argued in the written submission that the learned High Court judge did not make any ruling on it and therefore, it was 'apparently rejected'. In any event, counsel for the appellant submitted that since the complaint in the suit is about 'illegality' of the order for sale, the question of res judicata or functus officio does not arise. In the premises, it was submitted that the striking out jurisdiction of the court should not have been invoked by the learned High Court judge.

[14] Having regard to the charge action and the previous writ filed by the appellant to challenge the order for sale, in our view, the issue of res judicata

that was pleaded and argued by CIMB Bank and Ong Kay Ho in the High Court should be dealt with first.

WHETHER HIGH COURT ADDRESSED ISSUE OF RES JUDICATA?

[15] We shall first address the submission of counsel for CIMB Bank that the High Court did not rule that the doctrine of res judicata applies in this case.

[16] In our view, the said point is without any merit. Although, the learned High Court judge did not specifically mention the term res judicata in her grounds of judgment, it is obvious that her reason for allowing the striking out application is grounded in the said doctrine that was pleaded and argued before her. We say so for the following reason.

[17] In the grounds of judgment for the decision to strike out the action of CIMB Bank, after referring to the charge action which was uncontested, the learned High Court judge said that the appellant:

> ... was *estopped* from instituting a new court suit against the first defendant to set aside order for sale which has been properly and, lawfully obtained by the first defendant. (Emphasis added.)

[18] In the grounds of judgment for the decision to strike out the action against Ong Kay Ho, the learned High Court judge not only referred to the charge action which was not contested but she also referred to the previous suit to set aside the order for sale. Her Ladyship noted that the appellant did not appeal against the decision of the High Court to strike out her suit but instead chose to file the instant action to seek the same result with 'similar' prayers. Her Ladyship said as follows:

> 6.7 It is further evident from the multiplicity of the plaintiff's suits against both defendants without filing any appeal against the respective Bangi and Shah Alam Courts' judgment that, the plaintiff was 'fishing' for a court that will allow her claim against with and/or both defendants. In this regard, the plaintiff offered no explanation for the absence of any appeal, except to offer 'lame' excuse of her solicitor's wanting advice.

[19] From the above passages of the judgment of the learned High Court judge, it is abundantly clear that the submission of the counsel for the respondents that the doctrine of res judicata applies in the instant case was accepted by the High Court. The fact that the learned High Court judge used the phrase 'estopped' in the passage that we highlighted is a clear reference to the doctrine of res judicata. Even if it were otherwise, as res judicata was pleaded and argued in the court below, we are not precluded from considering it at this stage. There is also no merit in the argument that CIMB Bank should

have appealed against the alleged refusal of the High Court to rule that the res judicata applies in this case. It is trite that an appeal can be made only against a decision of a court. In the instant case, as the decision in the High Court was wholly in favour of the respondents, there was nothing for CIMB Bank to appeal against.

COMPARISON OF THE SUIT 723 AND THE INSTANT SUIT

[20] We shall now consider whether the action of the appellant in the instant suit is barred by the doctrine of res judicata.

[21] We are mindful of the principal argument of the appellant that CIMB Bank had knowledge of the death of Mr Muthiyah when they issued the notice of demand and the statutory notice under the NLC but yet chose to issue the notices in the name of the deceased. However, the appellant instituted Suit 723 to set aside the order for sale and the auction sale. Counsel for respondents argued forcefully that the point about the illegality or irregularity of the order for sale if any, should have been raised in Suit 723.

[22] For the purpose of appreciating the res judicata point, we shall set out below the essential points of the pleadings and prayers in Suit 723 and the instant suit below.

[23] In para 15 of Suit 723, the appellant pleaded that an officer from CIMB Bank contacted the appellant in June 2015 and requested that the outstanding loan sum be settled or else the house in question would be auctioned off. The appellant paid a sum of RM6,270 on 26 June 2015 at the Jalan Tun Perak branch of CIMB Bank. However, in October of 2016, some unknown person told her that he had purchased the property in a public auction. The appellant pleaded that CIMB Bank was negligent in auctioning off the property as she was not served with any documents relating to the auction. In the 'Particulars of Negligence', the appellant pleaded as follows.

(a) CIMB Bank did not take reasonable care;

(b) CIMB Bank did not consider the fact that the borrower had died;

(c) CIMB Bank failed to inform the insurer of the death of the borrower;

(d) CIMB Bank did not take further steps after being of the death of the borrower;

(e) because of the negligence of CIMB Bank, Ong Kay Ho is the registered owner now;

(f) *the auction was illegal*. (Emphasis added.)

[24] Among the reliefs she prayed for were an order to set aside the auction

sale and a declaration that the auction sale was null and void. As we said earlier Suit 723 against the CIMB Bank was struck out under O 18 r 19 and thereafter the appellant withdrew the suit against Ong Kay Ho.

[25] In the instant suit, the essential pleadings against CIMB Bank are as follows. In para 5 of the statement of claim, the appellant pleaded that the order for sale and the auction contravened the law. In para 18, the appellant pleaded that O 15 r 6A(4) was contravened as the deceased was cited as the respondent in the charge action. It was averred in other paragraphs that for the said reason, the order for sale and the auction were illegal and a 'nullity'.

[26] For sake of completeness, the other irregularities in the auction sale that were pleaded are as follows: The outstanding amount was not disclosed at the time of hearing of the charge action. The amount stated as owed in the notice of demand and in the Form 16D notice was incorrect. The valuation report commissioned in 2015 was used a year later for the auction sale in 2016. The proclamation of sale was not posted at the subject property. However, the main argument pursued during the appeal was illegality because the charge action cited the deceased borrower as a respondent and that O 15 r 6A and s 431A of the NLC were not complied with.

[27] The appellant sought the following reliefs apart from damages in the instant suit:

(a) for a declaration that the charge action against the deceased did not comply with O 15 r 6A of the Rules of Court 2012;

(b) for a declaration it was an abuse of process to commence action against the deceased;

(c) for an order that the order for sale is set aside; and

(d) all proceedings and orders based on the said order for sale be set aside;

[28] Thus, it must be noted that in both Suit 723 and the instant suit, the principal relief applied by the appellant is for an order to set aside the order for sale granted in the charge action and an order to set aside the auction sale to the successful bidder. In Suit 723, apart from pleading that CIMB Bank was negligent, the appellant also pleaded that the auction was illegal. In the instant suit, the appellant's new solicitors had been more specific in pleading illegality. They pleaded non-compliance of O 15 r 6A of the Rules of Court 2012 and s 431A of the NLC. But nonetheless, it is plain that the appellant's objective is the same in both suits. She is attempting to nullify the order for sale and the auction sale in question.

[29] Counsel for the respondent has argued that the plea of res judicata is not

A applicable to the instant suit because it comes under the exception of illegality. But first, we shall consider the doctrine of res judicata.

DOCTRINE OF RES JUDICATA

B **[30]** We can do no better than to make brief reference to the well-known Federal Court case of *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189. Peh Swee Chin FCJ succinctly described the doctrine in the following oft quoted passage which we set out below:

C > When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur*. The public policy of the law is that, it is in the public interest that there should be finality in litigation — interest *rei publicae ut sit finis litium*.

D

[31] Accordingly, the same matter finally decided by a court of competent jurisdiction between the same parties or their privies should not be litigated again. Otherwise, there will be no end to litigation and the binding effect of
E court decisions would be lost. In para 29 of the statement of claim in the instant case, the appellant pleaded that the cause of action in the previous suit was based on a 'tort' and that the issues raised here are different. In our view this plea is no answer to the principles governing the application of the doctrine of res judicata. The wider principle of res judicata would necessarily include the
F instant suit even if the previous action was a 'tort'.

[32] The celebrated passage on the wider principle of res judicata cited by Peh Swee Chin FCJ in the above-mentioned case is from the judgment of
G Wigram VC in the case of *Henderson v Henderson* (1843) 3 Hare 100 at p 115 which reads as follows:

> The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject
H of litigation and which the parties, exercising reasonable diligence might have brought forward at the time.

[33] The import of this passage was explained by Peh Swee Chin FCJ below:

I > In order to prevent multiplicity of action and also in order to protect the underlying rationales of estoppel *per rem judicatum* and not to act against them, such estoppel of cause of action has been extended to all other causes of action (based on the same facts or issues) *which should have been litigated or asserted in the original earlier action resulting in the final judgment, and which were not, either deliberately or due to inadvertence.* A few cases below will illustrate the point. (Emphasis added.)

[34] Therefore, a litigant cannot reserve or withhold a cause of action or an important issue of law such as illegality to be raised in a future action for it would defeat the policy purpose behind the doctrine of res judicata. In fact, one of the cases cited by Peh Swee Chin J to illustrate the application of the wider principle of res judicata is relevant to the instant case.

[35] In the Privy Council case of *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor* [1975] AC 581, upon default by the appellant on a mortgage, tthe bank sold the property to the second respondent. The appellant sued the bank claiming sham and nullity. After failing in this action, he sued again claiming fraud and collusion between the bank and the second respondent and alleging that the property was sold at a low price. The Privy Council dismissed the claim and said that the doctrine of res judicata in its wider sense applied and therefore it would be an abuse of the process of the court to raise in subsequent proceedings a matter which could and should have been litigated in the earlier proceedings. Lord Kilbrandon in his judgment approved a passage from the judgment of Somervell LJ in *Greenhalgh v Mallard* [1947] 2 All ER 255 that expanded the phrase 'every point which properly belonged to the subject of litigation'. The said passage is as follows:

> ... res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but ... it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

[36] In the instant case, the appellant sued the same parties as in Suit 723. The principal relief is the same, ie, to nullify the order for sale and the auction sale. In fact, as we pointed out earlier, in Suit 723, it was also pleaded that the auction sale was illegal although the main thrust of the pleading was about the negligence of the bank rather than non-compliance with O 15 r 6A of the Rules of Court 2012 and with s 431A of the NLC. In our view, without a doubt, these issues clearly and unmistakably belonged to the earlier suit as the objective of both suits is the same. The appellant averred in her statement of claim in the instant suit that the solicitor who acted for her in the earlier suit withdrew the action against Ong Kay Ho without her knowledge. Unfortunately for the respondent, the conduct or competence of a solicitor is not a matter that can be addressed in this suit and the remedy for it may lie elsewhere.

[37] However, given the factual matrix of Suit 723 and the instant suit, it is plain to us that the appellant is litigating by instalments. The doctrine of res judicata does not permit such an approach. It was pointed out Peh Swee Chin FCJ in the *Asia Commercial* case that in *SCF Finance Co Ltd v Masri and another (No 3)* [1987] QB 1028, even reservation of an issue by a party in a

previous proceeding was ineffective to prevent estoppel from applying against the said party.

ILLEGALITY AND RES JUDICATA

[38] Learned counsel for the appellant submitted that res judicata does not apply in this case because of the issue of illegality. He argued based on the Federal Court case of *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; [1998] 2 CLJ 75 that where a complaint of illegality is made about a court's order, the question of res judicata or functus officio does not arise. In support, he cited the following view of Gopal Sri Ram JCA as expressed in the head note of His Lordship's judgment:

> It is then entirely open to the court, upon the illegality being clearly shown, to grant a declaration to the effect that the order is invalid and to have it set aside. It is wrong to assume that such an order may only be corrected on appeal. It is clear in light of the principles established by high authority that a court of unlimited jurisdiction, even in the absence of an express enabling provision, has inherent power to set aside its orders made in breach of written law. The ends of justice will not be met if such a power did not exist. And the procedural branch of the broad and flexible doctrine of estoppel known as res judicata finds no place in such a circumstance. Neither has the functus officio theory any role to play in the case.

[39] In our respectful opinion, above mentioned passage does not apply to the facts of this case. In the *Badiaddin* case, the basic facts are as follows. Upon the grant of a loan to a borrower, the financier obtained a statutory charge over a Malay Reservation land as security in contravention of the Malay Reservations Enactment 1933. The land belonged to third parties. When the borrower defaulted, the financier foreclosed on the third-party security and obtained an order for sale. The third parties successfully set aside the order on the ground that the financier was not a 'Malay' under the Malay Reservations Enactment 1933 (the March 1988 order). The financier did not appeal but applied before the same judge to enter judgment against the third parties to return the advantage referred to in s 66 of the Contracts Act 1950. Not only was judgment was entered against the third parties but the land was ordered to be sold by public auction to satisfy the outstanding amount owed to the borrower (the October 1990 order). The third parties did not appeal but later applied to the High Court set aside 'the October 1990' order *ex debito justitiae* on the ground of illegality. The 'October 1990 order' was set aside by the High Court on 22 September 1995 but the decision was reversed by the Court of Appeal.

[40] The Federal Court restored the decision of the High Court to set aside the 'October 1990' order. Mohd Azmi FCJ who wrote one of the three judgments in the case said that the superior courts have inherent jurisdiction to set aside a court order on ground of illegality or lack of jurisdiction. However,

His Lordship cautioned that the exception to the rule that a High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction does not apply to all cases of contravention of law. His Lordship said as follows:

> For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court *ex debito justitiae* to a category of cases involving orders which contravened 'any written law', the contravention should be one which defies *a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law*. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception. (Emphasis added.)

[41] It may well be debatable whether the contravention of the law that is pleaded in this case is substantive, as in the *Badiaddin* case, or only procedural. However, the important point to note is this. The appellant, although aware of the threat of foreclosure proceedings as admitted in para 15 of the statement of claim in Suit 723, did not intervene during the hearing where the order for sale as granted. She impugned the order for sale via Suit 723. That was the time to argue based on the *Badiaddin* case that because the order for sale was illegal for non-compliance with substantive law, the doctrine of res judicata did not prevent her from challenging it collaterally in separate proceedings. She did not do so and did not file any appeal when the suit was struck out. Thus, the illegality issue respecting non-compliance with O 15 r 6A and s 431A of the NLC should have been raised in the charge action or in Suit 723 which was filed to impugn the order for sale. It is a point that clearly belonged to and is part of the earlier proceedings. In the premises, we are constrained to hold that the doctrine of res judicata bars the appellant from prosecuting a matter that had already been adjudicated twice, ie, in the charge action and in Suit 723.

CONCLUSION

[42] For the all the above reasons, we find that there is no appealable error in the decision of the High Court to strike out encls 15 and 38. Both appeals are therefore dismissed with costs of RM3,000 each subject to payment of allocatur.

Both appeals dismissed with costs of RM3,000 each subject to payment of allocatur.

Reported by Dzulqarnain Ab Fatar